

AO 243 (Rev. 2/95)

PETITION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT		District Northern District of New York
Name of Movant Daniel Porrazzo	Prisoner No. 11094-509	Case No. 1:20-cr-285
Place of Confinement Federal Correctional Institution, P.O. Box 1000, Milan, Michigan 48160		
UNITED STATES OF AMERICA		V. DANIEL PORRAZZO (name under which convicted)
MOTION		
<p>1. Name and location of court which entered the judgment of conviction under attack <u>U.S. District Court</u> <u>for the Northern District of New York, 445 Broadway, Albany, New York</u></p> <p>2. Date of judgment of conviction <u>03/17/2022</u></p> <p>3. Length of sentence <u>210 months</u></p> <p>4. Nature of offense involved (all counts) <u>Possession of Child Pornography - 2 counts</u></p> <p>5. What was your plea? (Check one)</p> <p>(a) Not guilty <input type="checkbox"/></p> <p>(b) Guilty <input checked="" type="checkbox"/></p> <p>(c) Nolo contendere <input type="checkbox"/></p> <p>If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: <u>n/a</u></p> <p>6. If you pleaded not guilty, what kind of trial did you have? (Check one) n/a</p> <p>(a) Jury <input type="checkbox"/></p> <p>(b) Judge only <input type="checkbox"/></p> <p>7. Did you testify at the trial? n/a</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>8. Did you appeal from the judgment of conviction?</p> <p>Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p>		

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9. If you did appeal, answer the following:

(a) Name of court United States Court of Appeals for the Second Circuit

(b) Result Appeal withdrawn per counsel's advice

(c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?

Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court n/a

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(5) Result _____

(6) Date of result _____

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

[illegible]

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

(b) Conviction obtained by use of coerced confession.

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- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (h) Denial of right of appeal.

A. Ground one: Defendant's acceptance of the plea agreement was not knowing or voluntary due to the deficient performance of counsel

Supporting FACTS (state *briefly* without citing cases or law)

-Over the defendant's objections, counsel advised him to agree that the video in question in Count 2 constituted child pornography under the law, which it does not.

-Counsel told defendant he would be charged and convicted of production of child pornography if he refused to accept the plea. See Brief for additional facts.

B. Ground two: Defendant is actually innocent of the U.S.S.G. §2G2.2(b)(7)(B) for producing child pornography, which was the basis for his Guideline Range

Supporting FACTS (state *briefly* without citing cases or law)

-Video in question does not constitute child pornography under the law.

-See Brief for additional facts/arguments/authorities.

C. Ground three: Ineffective assistance of trial and appellate counsel for not objecting to the application of U.S.S.G. §2G2.2(b)(7)(B) cross reference.

Supporting FACTS (state *briefly* without citing cases or law)

-Video does not constitute child pornography under the law.

-See Brief for additional facts/arguments/authorities.

- D. Ground four: Ineffective assistance of trial and appellate counsel for failing to object to / appeal the U.S.S.G. Chapt. 3, Part D multiple victim adjustment

Supporting FACTS (state *briefly* without citing cases or law)

Even if the video could be considered child pornography, Child-2 would be the only victim as Child-1 had no lascivious display of genitals. Therefore the "multiple victim" adjustment should not have been applied.

-See Brief for further details/arguments/authorities.

- E. Ground five: Ineffective assistance of trial and appellate counsel for failing to recognize/claim prosecutorial misconduct.

Supporting FACTS (state *briefly* without citing cases or law)

-Prosecutor falsified the amended plea agreement with a false description of the video, when the original accurate description did not satisfy the elements of child pornography. This resulted in an unreasonable sentence from an improperly calculated Guideline Range.

-See Brief for further facts/arguments/authorities

- F. Ground six: Ineffective assistance of trial counsel for failing to allow victim to testify on defendant's behalf at sentencing.

Supporting FACTS (state *briefly* without citing cases or law)

-If video constituted child pornography, then a victim (defendant's daughter) was present at sentencing and wanting to testify. She and defendant made counsel aware of her desire to testify. Counsel did not allow her to testify or submit a victim statement. Counsel did not bring her presence at sentencing to the notice of the Court. See Brief for further details/arguments/authorities.

- G. Ground seven: Ineffective assistance of trial counsel for failing to object to or correct the judge's prejudicial factual and procedural errors at sentencing.

Supporting FACTS (state *briefly* without citing cases or law)

-Judge made inaccurate factual statements regarding defendant's conduct that were worse than defendant's actual conduct and implied the judge had the wrong defendant in mind when pronouncing sentence.

-Judge violated federal court rules by failing to ask if any victims present wished to make a statement. See Brief for details/arguments/authorities.

- H. Ground eight: Ineffective assistance of appellate counsel in failing to argue on appeal that judge's errors were prejudicial.

Supporting FACTS (state *briefly* without citing cases or law)

-See above (Ground seven).

-See Brief for further details/arguments/authorities.

- I. Ground nine: Applying U.S.S.G. §2G2.2(b)(7)(B) cross reference violated the defendant's constitutional rights.

Supporting FACTS (state *briefly* without citing cases or law)

-By being found guilty of producing child pornography and receiving significant punishment for the prohibited conduct, defendant's rights to Due Process and Fair Trial were violated.

-See Brief for further details/arguments/authorities

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J. Ground ten: Ineffective assistance of appellate counsel for failing to file an Appellant's Brief, even if filed under Anders.

Supporting FACTS (state *briefly* without citing cases or law)

-Instead of advocating for poorly educated defendant, appellate counsel instead talked in him to withdrawing his appeal.

-See Brief for further details/arguments/authorities.

13. If any of the grounds listed in 12A, J were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

Appellate counsel advised defendant that she saw no nonfrivolous claims and advised defendant to pursue his claims through a §2255 motion.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐

No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing

(b) At arraignment and plea

James C. Knox of E. Stewart, Jones, Hacker, Murphy, LLP.

28 Second Street, Troy, New York 12180

(c) At trial n/a

(d) At sentencing James C. Knox

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(e) On appeal Jamesa J. Drake of Drake Law, LLC.P.O. Box 56, Auburn, ME. 04212(f) In any post-conviction proceeding n/a(g) On appeal from any adverse ruling in a post-conviction proceeding n/a

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

pro se

Signature of Attorney (if any)

Movant fully intends to file a Brief and Memorandum of Law and Fact in support of this motion within 21 days, as allowed by law.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

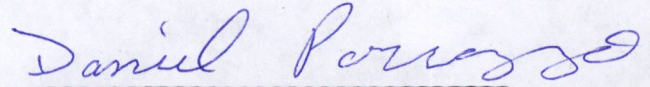
3-15-23

(date)

Daniel Porcuzzo
Signature of Movant

CERTIFICATE OF SERVICE

I, Daniel Porrazzo, declare under penalty of perjury and the Federal Mailbox Rule that I filed this §2255 Motion by placing a true and correct copy into the Institutional Mail system, pre-paid USPS First Class, on March 15, 2023, addressed to the Clerk of the U.S. District Court for the Northern District of New York, 445 Broadway, Albany, New York 12207.



Daniel Porrazzo

pro se

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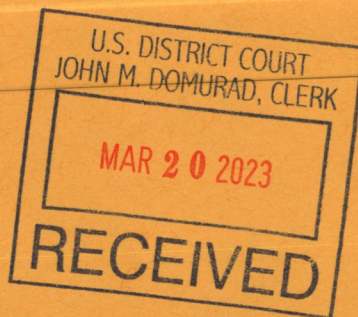


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